MAR 11 1955
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 543

G. E. BROWNING,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes Respondent, The State of Texas, and files this its brief in opposition to the petition for writ of certiorari.

Opinions Below

The opinion of the Court of Criminal Appeals of Texas has not yet been published, but copies of that Court's original opinion, opinion overruling the

motion for rehearing, and the opinion overruling a second motion for rehearing are appended hereto.

Jurisdiction

This Court does not have, nor should it exercise, jurisdiction under 28 U.S.C., Section 1257(3), because:

1. The decision of the Court of Criminal Appeals rests upon non-federal grounds which adequately and independently support its holding;

2. The federal question sought to be raised was at no time presented to or considered by the trial court or the Court of Criminal Appeals, and is being presented for the first time in the petition for writ of certiorari;

3. The federal question sought to be raised is not substantial.

Respondent's arguments in support of these jurisdictional points are made below under the heading, "Argument on Jurisdiction and Reasons for Denying Certiorari."

Questions Presented

1. Has this Court jurisdiction to consider an alleged violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States

(a) where Petitioner never suggested nor presented to the trial court or the Court of Criminal

Appeals any reference to a federal question involving a violation of the due process clause of the Fourteenth Amendment,

(b) where the Court of Criminal Appeals did not consider nor determine any issues relating to the Fourteenth Amendment, and

(c) where, following a decision by the Court of Criminal Appeals, Petitioner failed, in two motions for rehearing, to assign any error in the State Court's opinion relating to the Fourteenth Amendment?

2. Assuming, *arguendo*, that jurisdiction exists, does a State deny due process of law guaranteed by the Fourteenth Amendment when a State statute provides that an information charging a criminal offense in violation of the laws of that State need not negative any exception, excuse, proviso, or exemption to that law?

Statement

(Respondent's record references are to the Statement of Facts and to the Transcript on file in the Court of Criminal Appeals of Texas.)

Petitioner was convicted for the unlawful delivery of barbiturates upon each of three separate offenses alleged in a complaint and information, and his punishment was assessed on each count at 60 days in jail and a fine of $1,000.00. (T. 12). The statute upon which this conviction was obtained is an Act regulating the possession, handling, sale and distribution of barbiturates, making certain acts punish-

able as criminal offenses, and providing certain exceptions. Article 726c, Penal Code of the State of Texas. Section 12 of the Act provides as follows:

> "In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provisions of this Act, it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this Act, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant."

Petitioner appealed to the Court of Criminal Appeals of Texas and contended that the trial court erred in overruling his motion to quash the complaint and information upon the ground that they did not negative any of the exceptions set out in the statute whereby a legal delivery of barbiturates may be made. The Court of Criminal Appeals cited Section 12 of the Act (quoted above), which provides that it is not necessary in a complaint and information to negative any of the exceptions to the law, and affirmed the trial court's judgment.

Petitioner subsequently filed two motions for rehearing in the Court of Criminal Appeals. Both were based upon the premise that the Court erred in holding that the complaint and information need not negative any of the exceptions provided in the law. Both motions were overruled by the Court.

At no time before the trial court or the Court of Criminal Appeals did Petitioner submit any question as to a violation of the due process clause of the

Fourteenth Amendment. Nor did the Court consider such question in rendering its decision.

Petitioner then made petition for writ of certiorari to this Court, and for the first time sought to raise the federal question of due process.

Argument on Jurisdiction and Reasons for Denying Certiorari

The federal question sought to be raised by Petitioner—whether a State statute providing that an information charging a criminal offense need not negative exceptions to the law, is so harsh, severe and unconscionable as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States—is not properly presented by this record, because not properly preserved for review in the trial court or the Court of Criminal Appeals of Texas. Petitioner's reliance on the Fourteenth Amendment was never brought to the attention of either State Court. His sole argument in the Court of Criminal Appeals was that the information should have negatived the exceptions to the law. The Court based its decision entirely upon non-federal grounds, and did not consider any question relating to a violation of the Fourteenth Amendment. As stated in *Lynch v. New York*, 293 U.S. 52:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the

> federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Petitioner raised the question of due process for the first time in his petition for writ of certiorari to this Court. It is well settled that it is too late to raise a federal question for the first time in the petition for certiorari. *White River Lumber Co. v. Arkansas, ex rel. Appelgate*, 279 U.S. 692; *Whitney v. California*, 274 U.S. 337; *Thomas v. Iowa*, 209 U.S. 258.

The decisions rendered by this Honorable Court have settled the question beyond any doubt—the rule is indisputable. *Brown v. Atwell*, 92 U.S. 327; *Bolling v. Lersner*, 91 U.S. 594; *Blount v. Walker*, 134 U.S. 607; *Herb v. Pitcairn*, 324 U.S. 117.

Petitioner states on page 4 of his petition filed in this Court that

> "While the federal question was expressly presented neither in the trial court nor in the State Court of Appeals, it was impliedly presented and necessarily decided by both courts within the meaning of the case of Whitney v. California, 274 U.S. 357. . . ."

This statement constitutes an affirmative admission by Petitioner that this Court has no jurisdiction to hear his cause as the *Whitney* case is unavailable to support his position. He states that the federal question "was impliedly presented and necessarily decided . . . within the meaning of the case of *Whitney v. California*. . . ." This is a misinterpreta-

tion of the *Whitney* case for in that case the Court expressly stated on page 360:

> "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court." (Citing numerous cases).

And again on page 362:

> "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature . . . This necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here not presented in or passed upon by the Court of Appeal. . . ."

In the *Whitney* case it did not appear from the record that the defendant raised or that the State court considered or decided any federal question, but the State Court entered an order pursuant to a stipulation of the parties that it had considered and passed upon the federal question of due process. The Supreme Court in that case considered such order to be sufficient to raise the federal question and allow its jurisdiction to attach to the case. Here there has been no such certificate, agreement, or stipulation, nor could there be one in truth, for no federal

question was presented to or considered by the Texas court. As stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648:

> "The jurisdiction of this Court to re-examine the final judgment of a State court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

The burden is upon Petitioner to show affirmatively that this Court has jurisdiction. *Gorman v. Washington University*, 316 U.S. 98. Instead, Petitioner has affirmatively shown by his admission quoted above that the reverse is true. Respondent submits that no federal question of merit or otherwise has been raised within the meaning of 28 U.S.C., Section 1257(3), and the prior decisions of this Honorable Court. As a consequence, this Court has no jurisdiction to hear the cause.

In any event, the alleged federal question sought to be raised by Petitioner is without merit. It is entirely unclear to Respondent from the petition for certiorari just what particular federal ground is relied upon for jurisdiction, but it appears that Petitioner asserts he was denied due process of law under the Fourteenth Amendment to the United States Constitution because the information upon which he was tried failed to negative the exceptions to the statute under which he was charged. What Petitioner fails to acknowledge is that the Texas Legislature under Section 12 of the statute, as quoted

above, has stated that it is not necessary for an information charging an offense to negative the exceptions in the statute. And what Petitioner further fails to acknowledge is that the courts of Texas and of the other States have uniformly held, even without legislative sanction, that where an exception, exemption, or proviso to a statute is not itself descriptive of the offense described but merely removes and exempts certain persons or acts from the operation of the statute and thereby states matters of defense only, an information charging such an offense need not negative the exceptions. *Anderson v. State*, 105 S.W. 2d 258; *Baker v. State*, 106 S.W. 2d 308; *Rice v. State*, 38 S.W. 801; and *U. S. v. Cook*, 84 U.S. 168.

The Court of Criminal Appeals, in its opinion overruling Petitioner's second motion for rehearing, held that the exceptions and provisions to the statute under which Petitioner was tried, were not descriptive of the unlawful act and were merely matters of defense.

In approaching the question it must be remembered that in our particular dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as that power has been withdrawn by the Federal Constitution. *Hurtado v. California*, 110 U.S. 535. This Court may not pass upon the expediency, wisdom, or justice of the laws of the State, but may only determine their conformity with the Federal Constitution. In determining due process this Court may take into account only those fundamental rights which are expressed in that provision.

Twining v. New Jersey, 211 U.S. 78. Due process requires that the Court have jurisdiction, *Pennoyer v. Neff*, 95 U.S. 714, and that there shall be notice and opportunity for hearing given the parties. *Roller v. Holley*, 176 U.S. 398. Subject to these two fundamental rules, this Court has sustained all State laws regulating procedure, evidence and methods of trial as being consistent with due process of law. *Walker v. Sauvinet*, 92 U.S. 90; *Caldwell v. Texas*, 137 U.S. 692; *Leeper v. Texas*, 139 U.S. 462; *In re Duncan*, 139 U.S. 449; and *Twining v. New Jersey*, supra.

From these decisions it is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted complies with reasonable notice and affords fair opportunity to be heard. As stated in *Louisville and Nashville Railroad Co. v. Schmidt*, 177 U.S. 230:

> ". . . It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend; . . ."

See, also, *Hooker v. Los Angeles*, 188 U.S. 314, and *Rogers v. Peck*, 199 U.S. 435.

The Court of Criminal Appeals of Texas decided that the information charging Petitioner with a violation of the laws of the State was sufficient to set forth an offense as the Texas statute provided that it is not necessary to negative the exceptions, and without the aid of the statute, it was still not necessary to negative the exceptions as they were not descriptive of the offense.

Conclusion

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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March 14, 1955

A copy of this Reply, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, have been mailed this date to M. Gabriel Nahas, Jr., attorney for Petitioner, 602 Scanlan Building, Houston, Texas (First Class Postage Prepaid).

Appendix

Opinion of the Court of Criminal Appeals on Submission

G. E. Browning, Appellant,
No. 26,969. v.
The State of Texas, Appellee.

Appeal from Harris County.

Opinion

Appellant was convicted for the unlawful delivery of barbiturates upon each of three separate offenses alleged in the complaint and information, and his punishment was assessed on each count at sixty days in jail and a fine of $1,000.

Appellant contends that the court erred in overruling his motion to quash the complaint and information upon the ground that they do not negative any of the exceptions set out in other portions of the statute whereby a legal delivery of barbiturates may be made.

Art. 726c, Vernon's Ann. P.C., upon which this case is based, provides in Sec. 12 thereof as follows:

"Sec. 12. In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provisions of this Act, it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this Act, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant."

In view of this provision in said statute, there was no necessity for negativing the exceptions.

The testimony of M. A. Billnitzer, a detective for the City of Houston, shows that he visited appellant

in Houston on three different dates and each time told appellant that he needed something to make him sleep; that the appellant delivered to him on the first occasion 24 capsules, on the second occasion 26 capsules, and on the third occasion 24 capsules; that he (Billnitzer) delivered the capsules received on these visits in separate packages to Floyd E. McDonald, chemist for the City of Houston Police Department.

Floyd E. McDonald, chemist, identified the capsules delivered to him by M. A. Billnitzer and testified that they contained a derivative of barbituric acid known as sodium pento-barbiturate.

There is no testimony in the record showing that the appellant is "a person licensed * * * to prescribe and administer barbiturates."

We find the evidence sufficient to sustain the conviction.

The judgment is affirmed.

Belcher, Judge

(Delivered May 19, 1954)
Opinion approved by the Court.

Opinion of the Court of Criminal Appeals Overruling Motion for Rehearing

G. E. Browning, Appellant,
No. 26,969 v.
The State of Texas, Appellee.

Appeal from Harris County.

Opinion
On Motion for Rehearing

Appellant's motion for rehearing herein still complains of the proposition that the information does not negative the fact that appellant was one of the persons who came under the "unless" clause in Section 3, Paragraph (1) of the original statute passed by the 52nd Legislature, Regular Session, as found on page 759 of the Acts thereof. He still contends that the State's pleading should have negatived the fact that the appellant was, among other things, a pharmacist operating upon an original prescription, and the many further exceptions that are found therein.

We think the answer to such contention will be found in Section 12 of the original enactment, which is also found in Article 726c, Vernon's Ann. P.C., said Section 12 being quoted in the original opinion herein. We also think the same is in answer to the appellant's contention in this motion.

Thus believing, the motion for rehearing will be overruled.

Graves, Presiding Judge

(Delivered June 23, 1954)

Opinion of the Court of Criminal Appeals Overruling Second Motion for Rehearing

G. E. Browning, Appellant,
No. 26,969.
The State of Texas, Appellee
} Appeal from Harris County.

Opinion
On Second Motion for Rehearing

It is again insisted that under the rule stated and applied in Anderson v. State, 105 S.W. 2d 258; Baker v. State, 106 S.W. 2d 308; Rice v. State, 38 S.W. 801; and U. S. v. Cook, 21 L. Ed., 538, the information is fatally defective in failing to negative that the barbiturate was a compound, mixture or preparation such as declared to be without the act in Sec. 4 thereof; and in failing to negative the premise that the barbiturate may have been delivered by a pharmacist or practitioner under the conditions and in the manner permitted by Sec. 3a-1 and 2 of the statute.

If the exceptions and provisions are themselves descriptive of the unlawful act and if, in order to show the unlawful act, the state was under the necessity or proving that the act relied upon did not come within the exceptions or provisions then appellant's contention must be sustained.

The authorities mentioned support the contention that the legislature is without authority to relieve the state from negativing an exception which is a necessary element of the offense, without proof of which the things forbidden by the statute in question could not be proved or the case made out.

In considering the problem before us we note that the legislature has declared not only that it shall be

unnecessary to negative the exemptions, exceptions, provisos and excuses contained in the act, but has placed the burden of proof thereof on the defendant charged with delivery of a barbiturate.

This section of the act makes it clear that the delivery of a barbiturate is sufficient to show a prima facie violation of the statute, and that the burden then rests on the defendant to show (1) that the barbiturate is excepted under Sec. 4; or (2) that the defendant was a person authorized by law to deliver barbiturates under Sec. 3a-1 or 2; or (3) that the delivery was to a person to whom a barbiturate might be lawfully delivered under the exceptions found in Sec. 5 of the act.

We hold that Art. 726(c) V.A.P.C. makes the delivery of a barbiturate prima facie an offense; provides a method by which barbiturates may be delivered by those qualified and authorized to do so, and provides a means whereby compounds, mixtures and preparations for external use only may be lawfully delivered, but places upon the defendant the burden of showing facts by reason of which the delivery of the barbiturate is excepted, excused or exempted under the statute.

We cannot agree that the legislature was without authority to so provide, and remain convinced that the state was not required to negative the said exceptions, provisos and exemptions in their pleadings.

Appellant's second motion for rehearing is overruled.

Woodley, Judge

(Delivered October 20, 1954)